

Turner (Brandon), a minor,² filed a petition pursuant to the National Vaccine Injury Compensation Program³ (the Act or the Program). The petition states that “[o]n or about February 12, 1993, March 18, 1993, and August 16, 1993, Petitioner received hepatitis B vaccination(s) (a vaccine set forth in the Vaccine Injury Table) in the United States and experienced an adverse reaction to this (these) inoculation(s).” See Petition (Petn.), filed July 29, 1999.

I. Background

Proceedings in this matter were suspended for 180 days pursuant to Vaccine Rule 9(a). See Order filed March 13, 2000. Petitioner’s counsel filed four status reports between May 16, 2000 and March 13, 2001, indicating that he was in the process of collecting medical records and working with potential experts. See Petitioner’s Status Reports filed May 16, 2000, Aug. 21, 2000, Dec. 12, 2000, and Mar. 13, 2001. By July 10, 2002 Order, the special master requested that petitioner’s counsel schedule a status conference within fifteen days of the issuance of the order. See Order filed July 10, 2002. The order indicated that failure to schedule a status conference within this time frame would result in a deadline of September 30, 2002, for the filing of a medical expert’s report. Id. On July 19, 2002, petitioner’s counsel filed a status report in response to the court’s indicating that he wanted the case temporarily stayed pending the outcome of the Hepatitis B omnibus proceedings. See Petitioner’s Status Report filed July 19, 2002.

"Omnibus" proceedings under the Vaccine Program involve the litigation of

² On June 22, 2006, petitioner filed a Motion to Amend Caption. On June 28, 2006, the Special Master granted petitioner’s motion. Brandon Turner is currently the sole petitioner in this case because he is no longer a minor. As respondent’s counsel noted in his opposition to petitioner’s application for attorney’s fees, Brandon Turner had reached the age of majority before the petition in the instant case was filed by his mother. The filed records reflect that Brandon’s date of birth is April 3, 1978, making him twenty-one years old at the time of filing. See, e.g., Petitioner’s Exhibit (“P’s. Ex.”) 1 at 4. Respondent points out that “[n]o evidence has been offered showing that Brandon Turner was incapable of managing his legal affairs at the time the petition was filed, and no explanation has been provided for why the claim was brought by an individual who was not statutorily authorized to file a petition.” R’s Response, footnote 2 (citing 42 U.S.C. § 300aa-11(b)(1)(A)).

³ The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

several identified test cases at a joint hearing during which experts opine on the general causation issue of whether a particular vaccine can cause a particular injury. The commencement of omnibus proceedings requires the consent of counsel. Either during the joint hearing or during subsequent proceedings, the parties present evidence on the specific causation issue of whether a particular vaccine caused the particular injury alleged in each of the test cases. Findings from an omnibus proceeding on the general causation issue may be considered in each of the remaining “non-test” cases requiring a determination of whether or not the vaccine caused the injury alleged in that particular case.

For several years, the Office of Special Masters attempted to address, through various omnibus proceedings, the numerous filed petitions claiming injuries that resulted from the receipt of hepatitis B vaccinations. To address the remaining cases, several special masters, including the undersigned, conducted a coordinated, digitally-recorded status conference on March 27, 2006, for the purpose of scheduling further proceedings. See Order of 3/29/06. On March 29, 2006, the undersigned issued an Order in this case directing petitioner’s counsel to “consult with his client and file a status report, indicating how petitioner intends to proceed, by no later than Tuesday, May 30, 2006.” Order at 1 (emphasis omitted).

On June 22, 2006, petitioner filed the only set of medical records in this case. See Petitioner’s Exhibits (P. Ex.) 1-5. On that same day, petitioner also filed a Motion for Judgment on the Record (P’s Motion). On June 30, 2006, respondent filed Respondent’s Response to Petitioner’s Motion for Judgment on the Record (R’s Response). Respondent argued that “[p]etitioner provided no evidence – neither medical records nor medical opinion – to support his allegation that the hepatitis B vaccine caused his alleged injuries, and thus failed to support his claim as required by law.” R’s Response at 1-2 (citing 42 U.S.C. § 300aa-13(a)(1)).

The undersigned denied petitioner’s claim for Program compensation in an unpublished decision issued on September 5, 2006. See Decision, filed Sept. 5, 2006 (“Decision”) at 6. The undersigned dismissed the case for “want of proof” because petitioner was “unable to produce any evidence that the hepatitis B vaccinations caused his injury.” Decision at 6.

On April 19, 2007, petitioner’s counsel filed an Application for Attorneys’ Fees & Costs (“P. App.”) requesting \$6,842.00 for attorneys’ fees, \$8.21 for costs borne by

petitioner's counsel, and \$130.00 for costs borne by petitioner. P. App. at 2, 12.⁴ Petitioner's application included supporting documentation showing the nature of the costs incurred and the time that petitioner's counsel had expended for particular tasks in this case. On May 7, 2007, respondent filed Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs (R's Response). Respondent argues that petitioner's counsel's application for fees and costs should be denied as lacking a reasonable basis, "[w]here, as here, a petitioner utterly fails to adduce any evidence of a vaccine-related injury from the filing of a bare-boned petition throughout the pendency of the claim." R's Response at 5.

Petitioner's Application for Attorneys' Fees and Costs is now ripe for decision.

II. Discussion

The Vaccine Act permits an award of reasonable attorneys' fees and costs. 42 U.S.C. § 300 aa-15(e). "In evaluating good faith and reasonable basis, each petition must be reviewed on an individual basis. The court cannot presume the statutory requirements are present." Collins v. HHS, 1992 WL 164512, at *2 n.5 (Cl. Ct. Spec. Mstr. June 23, 1992)(internal citation omitted). "The 'good faith' requirement is subjective" [and focuses upon whether petitioner honestly believed he had a legitimate claim for compensation]. Di Roma v. HHS, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). In contrast, the "reasonable basis" requirement "is objective, looking not at the likelihood of success [of a claim] but more to the feasibility of the claim." Id. The "reasonable basis" determination "does not depend on petitioner's state of mind." Fournier v. HHS, 1992 WL 93242, at *1 (Cl. Ct. Spec. Mstr. Apr. 17, 1992); Barnes v. HHS, 1999 WL 797468, at *1 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). Instead, the court examines "a number of factors," including the factual support in the medical records for petitioner's claim. Di Roma at *1.

A special master's review of a petition for fees and costs must include a determination that the time spent by counsel on a claim was reasonable. In evaluating whether the number of hours of work for which counsel seeks to be paid were reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such

⁴ The undersigned notes that on page 2 of petitioner's counsel's Application for Attorney's Fees, counsel represents that his fees amount to \$6,837.00. On page 12 of the Application, petitioner's counsel represents that his fees amount to \$6,842.00. For purposes of calculating petitioner's counsel's requested fees, the undersigned has used the former amount and suggests that counsel be more diligent with respect to his calculations in the future.

hours from his fee submission.” Hensely v. Eckerhart, 461 U.S. 424, 434 (1983). “It is well within the special master’s discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done.” Saxton v. HHS, 3 F.3d 1517 at 1521.

A. Petitioner’s Position

Petitioner’s counsel submitted his petition for fees on April 19, 2007, and “respectfully request[ed] that the Court grant all reasonable compensation as allowed by the Vaccine Act.” P’s App. at 1. The Clerk of the Court entered judgment in this matter on September 20, 2006, 211 days before petitioner’s counsel filed his petition for fees and costs.⁵ Petitioner’s argument for the payment of fees and costs is based on the language of section 15(e) of the Vaccine Act, which permits an award of reasonable fees and costs even if petitioner does not prevail on his Program claim.

B. Respondent’s Position

Respondent argues that the court should deny petitioner’s counsel’s fee request “as lacking a reasonable basis.” R’s Opp. at 5. Respondent argues that Section 15(e) of the Vaccine Act “permits, but does not require, fees and costs to be awarded on a petition where entitlement has been denied provided that the ‘petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.’ Id. at 3, (citing 42 U.S.C. § 300aa-15(e)(1)); Di Roma at *1.

Respondent argues that for petitioner’s claim to have a “reasonable basis,” it must, at a minimum, be supported by medical records or medical opinion. 42 U.S.C. § 300aa-13(a)(1). Quoting Spagiare v. HHS, 1991 WL 146284, at *2 (Cl. Ct. Spec. Mstr. July 17, 1991), respondent asserts that although “it is reasonable to permit petitioners to supplement their petitions to meet the statutory requirements, it is also reasonable to put on them the risk of not being compensated for attorneys’ fees and costs if they file a petition without the necessary supporting documentation and are later unable to produce such documentation.”

C. Evaluating the Parties’ Positions

Hepatitis B became a covered vaccine on the Vaccine Injury Table as of August 6,

⁵ Vaccine Rule 13 states that “[a]ny request for attorneys’ fees and costs pursuant to 42 U.S.C. § 300aa-15(e) shall be filed no later than 180 days after the entry of judgment or the filing of an order concluding proceedings under Vaccine Rule 10(a) or 29.” Vaccine Rule 13.

1997. See Final Rule, 63 FR 25777 (May 11, 1998). Any claims for alleging injuries resulting from the receipt of hepatitis B vaccines on or before August 6, 1997, the effective date of the revision of the Vaccine Injury Table to include hepatitis B as a covered vaccine, must have been filed by not later than two years thereafter. See 42 U.S.C § 300aa-16(b). To preserve the claims of a number of petitioners filing hepatitis B claims, several counsel filed bare petitions on behalf of petitioners alleging injuries resulting from the receipt of hepatitis B vaccine shortly before the time for filing such claims expired. The petitions stated that the nature of the suffered injuries would be more fully described in subsequent filings. Petitioner's counsel in this case filed numerous petitions in this manner, and petitioner's claim, filed on July 29, 1999, is one of these filed petitions.

The Court appreciates and encourages the efforts of counsel to file petitions to preserve the claims of petitioners. The undersigned observes that in filing petitions to preserve petitioner's claims, counsel may not have fully evaluated the soon-to-be-time-barred claims, and the undersigned has considered this practical aspect of claim filing in her evaluation of this fees request. Nonetheless, in evaluating the instant fee application, the undersigned finds that some of the billing entries supporting counsel's request for fees appear to contain unreasonable duplications of effort.

The undersigned refers specifically to four particular instances of apparent duplicative billing entries.

First, petitioner's counsel billed 0.50 hours twice on November 9, 2001, to "[r]eview notice of appearance; review file to check on status of the records and exhibits filed." P's App. at 1.

Second, on October 2, 2003, attorney SSK billed 0.50 hours to "[p]repare Motion to Amend Caption." P's App. at 4. Subsequently, on June 22, 2006, SSK billed 0.3 hours to "prepare[] and electronically file Motion to Amend Caption." P's App. at 5.⁶ Petitioner's counsel filed the motion on June 22, 2006, and the undersigned granted the motion on June 28, 2006.

Third, on May 7, 2006, Mr. Shoemaker billed .10 hours twice to "[r]eview order of 20060501- designating as ECF." P's App. at 2.

Fourth, on May 28, 2006, attorney Shoemaker billed 0.50 hours of time to have a

⁶ In making a reduction for duplicative entries, the undersigned eliminated the second entry, as it was the more nominal amount.

“P[rivate]C[onference] with client; prepare SR; e-mail everyone with jobs to do to conclude case.” P’s App. at 2. The next line entry with the same date has Mr. Shoemaker billing 0.4 hours to “[p]repare SR re client’s intent to dismiss; e-mail Sabrina to follow up.” Id. at 3.

The time spent repeating these tasks described does not appear to be a reasonable expenditure of time on the tasks performed, and the undersigned cannot award fees for the performance of discrete tasks more than once on the same day in three of the noted instances. Declining to award the fees associated with the second, duplicative billing entry for the four referenced billing entries, the undersigned reduces petitioner’s counsel’s fee request by the following amounts:

- (1) \$125.00 for one of the entries billed by petitioner’s counsel on November 9, 2001, to “[r]eview notice of appearance; review file to check on status of the records and exhibits filed.” P’s App. at 1.
- (2) \$49.50 for 0.3 hours SSK billed to “prepare[] and electronically file Motion to Amend Caption.” P’s App. at 5.
- (3) \$30.00 for one of the .10 hours billed by Mr. Shoemaker to “[r]eview order of 20060501- designating as ECF.” P’s App. at 2.
- (4) \$120.00 for 0.40 hours of time to have a “P[rivate]C[onference] with client; prepare SR; e-mail everyone with jobs to do to conclude case.” P’s App. at 3.

Accordingly, petitioner’s counsel’s fee request is reduced by \$324.50.

III. CONCLUSION

Based on the undersigned’s review of petitioner’s fee application and respondent’s objections, and for the foregoing reasons, petitioner is awarded \$6512.50 in attorneys’ fees and \$8.21 in attorneys’ costs. The award shall be made payable jointly to petitioner and his attorneys. Additionally, petitioner is awarded \$130.00 in petitioner’s costs. The award shall be made payable solely to petitioner.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master